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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 14 2005

EAC 03 148 52073

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mark Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a regulatory analyst at the American Stock Exchange (Amex). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We note that 8 C.F.R. § 204.5(k)(4)(ii) states that, to apply for the exemption, the petitioner must submit Form ETA-750B, Statement of Qualifications of Alien, in duplicate. The record contains only a partial Form ETA-750B (the first page is missing), and therefore the petitioner has not properly applied for the national interest waiver. The director, however, did not note this discrepancy in the denial notice, and never issued a request for evidence to allow the petitioner to remedy the omission. We will, therefore, review the matter on the merits.

Counsel states that the petitioner "is a prominent financial regulatory analyst" who "has made remarkable individual contributions which significantly help establish a fair, orderly trustworthy stock market that is a vital component of our financial industry." Counsel states that labor certification would be inappropriate in this instance because "it is not designed for people with outstanding individual merits."[1]

Several witness letters accompany the petition[redacted] vice president of Equity Trading Analysis at the American Stock Exchange, describes the petitioner's work for that entity:

> Although it is virtually impossible to determine the full scope of securities fraud in the United States, it is an illegal practice that has had alarming results for investors, large and small. Monitoring equity trading in markets and enforcing compliance with the federal securities laws and the Amex rules is of tremendous value to our national economy and the stability of our financial community. It is in this important field in which [the petitioner] excels. . . .
>
> In a short time [the petitioner] has grasped the underlying formulas used to determine potential violations in the market and has recommended significant enhancements to our exception reports that have benefited the entire departments. [The petitioner] is very adept at

[1] Counsel offers the following analogy: "a labor certification filed on behalf of **Dr**[redacted] for the position of professor **might have been defeated** so long as an ordinary professor **had been available**" (counsel's emphasis). This argument appears to assume that the only avenues of immigration for alien professionals is through labor certification or the national interest waiver, and ignores the fact that other immigrant classifications exist for aliens with major national or international reputations. Using counsel's example, Albert Einstein was already a Nobel laureate (and, arguably, a household name) when he arrived in the United States in the 1930s, and he easily would have qualified as an alien of extraordinary ability under section 203(b)(1)(A) of the Act, or as an outstanding researcher under section 203(b)(1)(B) of the Act, had those classifications existed at the time.

completing the exception reports, which monitor the potential violations in trading activities on the trading floor, in a timely and accurate manner.

John Dittami, manager of Research and Strategy Development for Southfield Management Company, states:

> [The petitioner] is a key investigator in the trading quality team at American Stock Exchange (Amex) to keep a fair and orderly market, and has played a leading role in a number of very important projects. He established controls to monitor and evaluate floor specialist and broker performance and execution quality, ensure that all customers are treated fairly in the execution of orders and allocation of trades and maintain accurate and complete trading records documenting the firm's efforts to achieve best execution.
>
> One of the most important projects he works on is monitoring orders executed outside of the posted bid or offer on Amex. Having an SEC [Securities and Exchange Commission]-mandated responsibility to insure that specialists execute their customers' orders at the best possible price, [the petitioner] reviews the trading records to identify the violations [of] this rule. . . .
>
> In 2002, [the petitioner] drew national attention for his achievement. He took the challenge to investigate the firm quote violation on all the NASDAQ stocks traded on Amex. He is the only one who was appointed at Amex to monitor firm quote violation of trades of NASDAQ stocks at Amex. . . . The new monitoring system he worked on and helped to improve had [to] successfully deal with tons of trading data and identify the violations accurately. . . .
>
> Another important work [the petitioner] does for the capital market is to detect the continuity and depth move of the specialists' trading. . . . He did excellent investigations to explore questionable trading situations.

Li Wei, director of Research at the Division of Strategy and Research of the New York Stock Exchange, states:

> As an expert on stock market regulation, I have known [the petitioner's] achievement[s] for years, but I have not work[ed] with him in the past. [The petitioner] is a rare individual and deserves my strong support. . . . He is one of the pioneering regulatory analysts in this field. I attest that [the petitioner's] work has achieved significant national impact. . . .
>
> **He developed very successful Unusual Activity report to detect insider trading, which benefits US stock market**. . . .
>
> He has shown his exceptional statistical skill in the logic of the report. He has used percentage changes of price and volume to measure the potential violation, which can be easily used to apply statistical analysis to the trading data. He built a dynamic five-factor model that reflects the percentage changes of price and volume, instead of the static two-factor model, which [is] usually used by regulation department[s] of other exchanges. The new model reduces substantially the workflow of regulatory analysts, but it broadens the scope of the report. So, it made the report more accurate and timely. Due to the confidential reason [sic], [the petitioner's] innovation in the report to identify the unusual trading activity was not published in the media. But since all the national exchanges in US cooperate closely

> to detect violations in the stock market, his ideas and methods have benefited other stock exchanges to improve their procedures to detect insider trading. . . .
>
> **[The petitioner's] work to regulate NASDAQ stocks on an UTP basis traded on American Stock Exchange is of great important[ce] to the national interest.**
>
> An Unlisted Trading Privilege (UTP) . . . permits securities listed on [one] national exchange to be traded by other exchanges. American Stock Exchange (Amex) started to trade NASDAQ listed stocks [on] an UTP basis in 2002. Since this was a great innovation in the stock market, regulations on those UTPs draw national attention and became very crucial to Amex. [The petitioner] is a key member of the UTP regulation team. . . .
>
> [The petitioner's] pioneer work has also shown a new solution for other national exchanges to regulate their current and future trading of stocks listed on other exchanges. As a competitor of Amex, we also learned from [the petitioner's] experience and applied it to the regulation works of our UTPs.

Several other witnesses offer similar statements, asserting that the petitioner serves the national interest by detecting and reporting suspected insider trading.

The director denied the petition, stating that the letters submitted in support of the petition do not "substantiate the national impact of [the petitioner's] contributions." The director noted, for instance, that significant efforts to detect insider training would presumably have come to the attention of SEC officials or the media. The director asserted that simply possessing the necessary skills to do his job (i.e., to detect and report insider trading) is not sufficient to qualify the petitioner for the special benefit of a waiver.

On appeal, the petitioner submits an updated *curriculum vitae*, indicating that he left Amex in June 2004. The petitioner worked briefly as manager of the Best Execution Department at the National Association of Securities Dealers, and became a compliance associate at Morgan Stanley in September 2004. Regarding the national impact of his work, the petitioner repeats the claim that he "drew nationwide attention on the surveillance of UTP trading" and "created a new model to ensure the detecting process compatible [with] both Amex and NASDAQ rules." The petitioner also argues that much of his work product is confidential and unpublished, which raises the question of how, exactly, his work "drew nationwide attention," and how the petitioner came to learn of this attention.

A lengthy statement written in the third person, but signed by the petitioner, describes the petitioner's goals:

> The long-term goal of [the petitioner's] research work is to build a nation-wide computerized regulation system that will significantly reduce trading violations and securities frauds. At present, he's interested in developing a computerized regulation system for major Wall Street brokerage firms. After successfully creating modeling analysis and other practical regulation enhancement tools for stock market exchanges, [the petitioner] was recently invited to join the Global Compliance Department at Morgan Stanley, the world's second biggest brokerage firm, to set up a computerized surveillance and compliance alerting system. . . .
>
> [The petitioner's] research is to apply a risk-based approach to the development of a new surveillance system that measures and monitors a wide range of broker-dealer trading activities. . . . Using sophisticated statistical analytic methods for [which the petitioner] is

> well known in the industry, the new system will identify changes in the patterns of broker-dealer activities and flag those that are distinctly different from other firms. . . . His research is to broaden the criteria of the screening process so that the focus of an investigation is on patterns, rather than a single instance of unusual activity.

The petitioner argues that the nature of his work demands frequent changes of employment, thus making labor certification impossible. We note that the portability provisions of section 204(j) of the Act already address the conflict between a lengthy labor certification and adjustment process and changes of employment. The record contains no comment from any Morgan Stanley official to indicate that the petitioner's claimed reputation played any role in his hiring, or to show that the petitioner's role at that company in any way exceeds the typical duties of a regulatory analyst.[2] The claimed uniqueness of the nature of the petitioner's work is not the only plausible explanation for his repeated changes of employer, and therefore we need not presume that the petitioner's rendition of events is entirely accurate.

Several new witness letters accompany the appeal. Christopher Solgan, a former SEC attorney, states that the petitioner "has made significant contributions" but fails to elaborate. [redacted], now at Citigroup, was formerly the petitioner's supervisor at Amex. [redacted] states that the petitioner's "new model" represents "pioneer work [that] led to a new solution for the whole industry and set an example for other exchanges to regulate the innovative product." Other witnesses praise the petitioner's model, but the record does not demonstrate that other stock exchanges have actually adopted the petitioner's model. General statements about "the whole industry" and "other exchanges" cannot suffice in this regard. The record is devoid of statistical evidence to show that the petitioner's models have, in fact, significantly reduced insider trading or increased the number of successful investigations of insider trading allegations.

The record contains high praise from certain witnesses, but no objective evidence to show that the petitioner has consistently had considerably greater impact or influence than other regulatory analysts employed in U.S. financial markets. Because preventing and detecting insider trading is a fundamental task of regulatory analysts, the fact that the petitioner performs this function is not *prima facie* evidence of eligibility.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.

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[2] Specific details about the petitioner's individual projects at Morgan Stanley cannot establish eligibility, because these activities took place after the filing date; but general information about the circumstances of the petitioner's hiring and his initial duties there can circumstantially support claims regarding the petitioner's claimed reputation.